In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 123

MURIEL C. PISTOLESI, also known as MURIEL C. SAVAGE,
Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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1. Statement of the case.

Two life insurance policies are involved, aggregating $7,000. The ordinary benefits have been satisfied. The claim of plaintiff is for double indemnity.

The policyholder, Norbert H. Pistolesi, is alleged to have suffered a heart attack while traveling hand-over-hand suspended from a wire strung between two masts of a pleasure yacht. One hand missed the wire so that his body swung around with a sudden lurch and he held on to the wire with his other hand.

Mr. Pistolesi died three weeks later of coronary occlusion. Whether there was a heart attack; whether the attack caused the slip; whether his death resulted, directly or indirectly from pre-existing arterial disease, so that it was not covered by the double-indemnity clause, were questions presented for decision. But they were not decided by the Circuit Court for the reason that the requirements of the policy as to evidence of the alleged injury were not satisfied. On this ground, the Circuit Court held that the plaintiff could not recover. The requirement in question is that the alleged accidental injury be revealed by an autopsy or evidenced by a contusion or wound on the exterior of the body. Neither of these conditions was satisfied. Hence, the insurance company was entitled to judgment.

The plaintiff is the widow of Mr. Pistolesi. Having remarried prior to the trial, she is referred to in the record as Mrs. Savage, and will be so identified in this brief.

Mrs. Savage's statement of the case refers (petition, page 4) to "all of the manifestations of a severe heart injury apparent immediately after the accident, blue lips (cyanosis), extreme pallor, labored breathing and profuse perspiration . . ." But there was no evidence that these were all the manifestations of a severe heart injury, nor as to what manifestations are ordinarily present in the case of such an injury.

Another statement (petition, pages 4-5) that Mrs. Savage "did not know of the existence of the insurance policies until the day after the funeral when a friend, Mr. Ireland, took the policies to her" is in-

accurate. Mrs. Savage testified that at the time of the funeral she knew her husband "had insurance policies, but not what they were or the details" (Transcript, pages 128-129).

We also disagree with Mrs. Savage's assertion (petion, page 6):

> Upon appeal the Circuit Court reversed the petitioner's judgment in an opinion containing such an incomplete and inconsistent statement of facts, and conclusion of law encompassing them, that it ordered a modification of its opinion designed to reconcile the inconsistency and contradiction.

The only changes in the opinion (except with respect to the mandate) appear in one paragraph which is quoted here in its original and modified form.

ORIGINAL	AS MODIFIED
It is possible that such a heart affliction as here claimed may gradually deposit in the veins and arteries material which will slow the circulation and in time cause a blueing of the lips by such deposit there. It is not necessary to decide whether this would be a contusion. Here the testimony is that the blue lips were seen only immediately after the deceased had descended from the rigging. It is not claimed that he sustained a blow on the lips or that they were swollen.	It is possible that such a heart affliction as here claimed may gradually deposit in the veins and arteries material which will slow the circulation and in time cause a permanent blueing of the lips by such deposit therein. It is not necessary to decide whether this would be a contusion. Here the testimony is that the blue lips appeared only when the deceased physically exerted himself. It is not claimed that he sustained a blow on the lips or that they were swollen.

The changes consist of the insertion of the word "permanent" and the correction of the statement as to the occasions on which the blue lips appeared. Else-

where in the opinion in its original form the Court had pointed out that the blueing of the lips was "recurring" (Transcript, page 298).

It should also be noted that in denying the Insurance Company's motion for judgment n. o. v., the District Judge—Hon. Chase Clark of Idaho, sitting pro tempore at San Francisco—filed an opinion in which he unmistakably disclosed that he was in doubt as to the propriety of his decision. In discussing the issue of contusion or wound, he said:

> There is no procedure provided for certifying this question to the United States Circuit Court of Appeals of the Ninth Circuit so that this Court could be advised before ruling on these motions . . . (Tr. p. 41).

2. Summary of Argument.

(a) No ground for certiorari is advanced by the petition (section 3).

(b) The Court has recently denied certiorari in a case involving the identical policy provision, and in which the manifestations were even more extensive than those in the case at bar (section 4).

(c) The contention of petitioner premised on the theory that an autopsy was excused is opposed to the position adopted by the petitioner in the District Court. A writ of certiorari should not be issued to consider a question which is in conflict with the theory advanced by the petitioner at the trial (section 5).

(d) An autopsy revealing an internal accidental injury is an absolute condition to the elimination of the requirement of a contusion or wound.

In pointing out that there was no autopsy, the Circuit Court's opinion disposed of that aspect of the double indemnity clause.

The reason why no autopsy was held is immaterial, and there was no necessity for comment on the subject in the opinion of the Circuit Court (section 6).

(e) The only authority on the point rejects the contention that compliance with the autopsy provision can be dispensed with or excused (section 7).

(f) The Circuit Court's decision that pallor and blue lips do not constitute a contusion or wound is sound in principle and is in accord with all other authority on the point (section 8).

(g) Contrary to the assertions in the petition, there is no case holding that the manifestations exhibited by Mr. Pistolesi constitute a contusion or wound (section 9).

(h) Although the precise question has not been decided in the state courts of California, every indication from that source leads to the conclusion that the provisions of this policy would be held clear, certain and unambiguous, and would be construed to mean precisely what they say without distortion or strain in order to impose liability on the insurance company (section 10).

(i) There was no conflict of evidence on the issue of contusion or wound and, therefore, the determination of the issue was for the Court (section 11).

(j) The Circuit Court properly directed entry of judgment for the insurance company (section 12).

ARGUMENT.

3. No ground for certiorari is advanced by the petition.

Aside from the fact that, as will hereafter appear, the decision of the Circuit Court is correct on the merits, there arises at the threshold of the consideration of the case the limitations set forth in section 5 of rule 38 with respect to issuance of certiorari.

The only question decided by the Circuit Court involves the meaning of the language of a policy of insurance and the application of that language to undisputed physical facts.

There is no special or important reason for review. No important question of local law has been decided. No question of federal law has been decided. Strictly speaking, no question of law is involved, but merely the meaning of the words adequately defined by the dictionaries and thoroughly understood as a matter of popular acceptance.

There is no conflict between the decision in this case and the decision of any other Circuit Court of Appeals. In no other case—federal or state—have the manifestations resulting from a heart attack been held to satisfy the requirements of the "contusion or wound" provision of the double indemnity clause. In two cases in which a heart condition participated in causing death, the manifestations were held insufficient. (*Paul Revere Life v. Stanfield,* 151 Fed. (2d) 776; *Dupee v. Travelers,* 2 N. Y. Supp. (2d) 62, see below). Every decision involving symptoms comparable to those at bar has held that they do not satisfy the requirements of the clause.

Furthermore, since *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, the law controlling this case is that of California. Even if the Circuit Courts were in disagreement—and they are not—this would not suffice to warrant review. This question was decided in *Ruhlin v. New York Life,* 304 U. S. 202, 206, 82 L. Ed. 1290, 1292-93, where the Court held:

> As to the questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.
>
> . . . . . .
>
> No decision at the present time could reconcile any "conflict of circuits", or do more than enunciate a tentative rule to guide particular federal courts. Therefore, even assuming that it is adequately presented on the record, we decline to decide the issue of state law.

And, citing the *Ruhlin* case, the Court held in *Huddleston v. Dwyer,* 322 U. S. 232, 237, 88 L. Ed. 1246, 1249:

> . . . ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts.

4. The Court has recently denied certiorari in a case involving the identical policy provision, and in which the manifestations were even more extensive than those in the case at bar.

The following are the manifestations relied on by Mrs. Savage for recovery:

> Pallor or whiteness, blue lips, profuse perspiration, labored breathing, general weakness or de-

bility, drawn countenance, complaints of pain and shuffling walk.

We may at once reject all of these items except pallor or whiteness, blue lips, perspiration and drawn countenance. The others are not even concerned with the appearance of the exterior of the body. As to perspiration and drawn countenance, by no stretch of the imagination can they qualify as a contusion or wound. Hence, the case is reduced to the items of pallor and blue lips.

In *Paul Revere Life v. Stanfield,* 151 Fed. (2d) 776 (C.C.A. 10th Circ.), the manifestations were as follows:

> His clothes were wet with perspiration; he complained of smothering to death and of pains in his arms; his face was a *pale yellow color* and his lips were *blue* and swollen; the pupils of his eyes were dilated, and his eyes were glassy; he vomited blood practically the entire time, and hot fluid flowed from his nose; and just before death occurred his "skin had turned *blue practically all over his body*" (p. 777).*

The immediate cause of Stanfield's death was a "heart block or coronary occlusion" (see transcript of Stanfield record, page 17).

The District Court's judgment in favor of Mrs. Stanfield was reversed with directions to enter judgment for the insurance company.

The Supreme Court denied certiorari (90 Adv. Op. 732, March 25, 1946).

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*Italics supplied unless otherwise indicated.

In the case at bar, there was no swelling of the lips, there was no dilation of the eyes, the skin did not turn blue "practically all over the body." The opinion at bar pointed out particularly that "it is not claimed" that Mr. Pistolesi's lips "were swollen" (Tr. 300).

No adequate reason appears why Mrs. Savage should be accorded relief which was denied Mrs. Stanfield. In fact, the latter presented a much more persuasive showing; nevertheless, certiorari was refused.

5. The contention of the petitioner premised on the theory that an autopsy was excused is opposed to the position adopted by the petitioner in the District Court. A writ of certiorari should not be issued to consider a question which is in conflict with the theory advanced by the petitioner at the trial.

The provision in the policy for revealing an internal injury by an autopsy is an exception from the requirement that the injury must be evidenced by a contusion or wound on the exterior of the body.

The clause reads:

> . . . as evidence of which injury (*except in case of* drowning or of *internal injuries* revealed by an autopsy) there is a visible contusion or wound on the exterior of the body.

The provision for revealing an internal injury by an autopsy contains a privilege extended to the beneficiary to take the case out of the contusion or wound requirement. If the beneficiary does not or cannot avail herself of that privilege, the requirement of a contusion or wound stands and must be complied with.

As we shall hereafter show, this is the only possible construction of the policy. But at this juncture we are concerned with the petitioner's complaint that the Circuit Court did not consider the following contention, viz.: that the autopsy was "excused" and that the contusion or wound requirement is not applicable to the case (brief, pages 15-22).

The conclusive answer to this complaint—aside from its intrinsic lack of merit—is that at the trial in the District Court the petitioner adopted the contrary position and procured the submission of the case to the jury on the theory that the conclusive test was whether Mr. Pistolesi's symptoms constituted a contusion or wound.

Surely, the petitioner cannot reasonably demand the intervention of the Supreme Court by certiorari on the ground that the Circuit Court has failed to consider a point which is in conflict with the position taken by the petitioner at the trial.

The record clearly demonstrates petitioner's position in the trial Court. First, is the statement in the instructions to the jury setting forth Mrs. Savage's claims:

> It is claimed by the plaintiff . . . that as evidence of such injury, there was a visible contusion or wound on the exterior of the body of Norbert H. Pistolesi within the intent and meaning of said policies of insurance (Tr. p. 267-8).

Then the instructions proceed to set forth the "three points of inquiry" into which the case "resolves itself" (Tr. p. 268).

The second point embodies the question whether the injury was "evidenced by a visible contusion or wound within the sense and meaning of the policy" (Tr. 268).

The instructions offered by Mrs. Savage were based on this theory. They appear in the charge to the jury (Tr. p. 270-1) and in the statement of points to be relied on by the insurance company—appellant in the Circuit Court (Items 24-28, Tr. pp. 53-54).

Petitioner's position at the trial as above stated is corroborated by the language of the petition on file in this Court. The petition states:

> The jury found under proper instructions of the trial Court that the accidental means injury was evidenced by a visible contusion or wound on the exterior of the body within the meaning and intendments of the policies as a whole (p. 6).

It follows that the Circuit Court of Appeals was not obliged to give extended consideration to the point now advanced by Mrs. Savage. Hence, for the several reasons above noted, there is no ground for granting *certiorari*.

We proceed now to a discussion of the merits of the contentions advanced by the petitioner.

6. An autopsy revealing an internal accidental injury is an absolute condition to the elimination of the requirement of a contusion or wound.

In pointing out that there was no autopsy the Circuit Court's opinion disposed of that aspect of the double indemnity clause.

The reason why no autopsy was held is immaterial and there was no necessity for comment on the subject in the opinion of the Circuit Court.

The policy requires as the basis of recovery that the accidental injury be evidenced by a contusion or wound on the exterior of the body.

There are two exceptions to this requirement. One is drowning. The other is "internal injuries revealed by an autopsy."

Mr. Pistolesi was not drowned.

His alleged internal injury was not revealed by an autopsy.

Therefore, it became incumbent on Mrs. Savage to show that the injury was evidenced by a contusion or wound.

When the opinion of the Circuit Court of Appeals stated that there was no autopsy (Tr. p. 298), that disposed of the point. The only issue which remained necessary for determination was whether there was a contusion or wound.

Why no autopsy was held is immaterial. There was no duty on the part of the Circuit Court to discuss that subject. There was no logical reason for such discussion.

Petitioner's brief (page 15) describes as "the preliminary issue" the question whether there was a contusion or wound. This places the cart before the horse. The first question is whether the requirement of contusion or wound is eliminated by reason of the fact that the internal injury is revealed by autopsy. If it is, then the conditions of the policy are satisfied. If not, then the contusion requirement governs the case and the injury must be evidenced by a contusion or wound in order to justify recovery.

Under the policy, Mrs. Savage is accorded the right to present certain evidence in order to prove an accidental internal injury. If she has failed to do so, she cannot impose on the insurance company a liability not undertaken in the contract, merely because she has by her own act and without the knowledge of the company, rendered impossible the performance of an essential condition to recovery. It makes no difference that the act of cremation occurred before Mrs. Savage examined the policy.

The company inserted the provision so as to limit the coverage and protect itself from unwarranted claims. If an autopsy had been held, it would have comprised an examination of the coronary arteries. This—in all likelihood—would have disclosed a case of advanced sclerosis demonstrating that the disease was the primary cause of death. No internal injury would have been revealed.

In a true case of fatal accidental injury, there is no danger of cremation without an autopsy. In cases of accidental death, the Health Codes of the various

states require intervention by the appropriate public agency. In California this is the function of the coroner (Health and Safety Code, Section 10425), who is authorized to conduct an autopsy (id., Section 10375, subdivision 22). Thus, any case which is deemed accidental and in which the injury is internal, will be referred to the public authorities. Their conclusions evidenced by an official certificate (id., Section 10551) will be available to assist in settlement of doubt or controversy.

Thus, the Health Code gives complete protection to the beneficiary under the policy even though such beneficiary is ignorant of the terms of the policy (as in this case), or even of its existence.

The reason why no autopsy was held in the case of Mr. Pistolesi was that the attending physician, Dr. Wagner, was of the opinion that the death was from natural causes.

Dr. Wagner signed a death certificate fixing the duration of the myocardial failure at "one week" (T. 112). This would rule out any theory of accidental means, because nearly three weeks intervened between the incident on the boat and the death.

Dr. Wagner did not believe that an accident was involved, or that an injury was a contributing cause of death. If he had so believed, he could not have signed the death certificate. (Health and Safety Code, Section 10400, subdivisions c and d).*

*The provisions of the California Health Code above cited will be set forth in the appendix to this brief.

Conditions set forth in a contract as essential grounds for recovery must be satisfied (*Ogburn v. Travelers,* 207 Cal. 50). Courts cannot make a new contract for the parties merely because one of them has put herself in a position in which she is unable to fulfill the stipulated condition.

If the insurance company had consented to cremation, this might be deemed a waiver of the requirement that the injury be revealed by an autopsy. But the cremation took place two days after death and without the company's knowledge. Mrs. Savage cannot excuse herself from compliance with the contract because by her own act—though unwitting—she made compliance impossible.

In *Mutual Life v. Hess,* 161 Fed. (2d) 1 (C.C.A. 5th Circ.) the Court points out the difference between a provision giving the insurance company the right to make an autopsy, and a provision in which the autopsy is a condition to the coverage. There the body was cremated without knowledge of the provision giving the company the right to an autopsy. But there was no requirement—as in the case at bar—that the injury be revealed by an autopsy. The Court held:

> If this insurance was dependent on a clear condition, Mrs. Hess' ignorance of the condition and her innocence in omitting performance of it would hardly change the contract under which she claims, unless there was waiver or estoppel on the part of the Company. We find a better and more conclusive answer to the Company's position in this, that the quoted stipulation is

> not made a condition of the insurance nor is it declared that an omission to afford the opportunity to examine the body and have an autopsy shall forfeit the insurance or any part of it (p 3).

The end result to which the petitioner's argument leads is that there need be no compliance whatever with the conditions of the double indemnity clause. Thus, Mrs. Savage asks that the conditions should be disregarded—in other words, that the courts should re-write the contract.

The company made an exception to the general requirement of a contusion or wound by agreeing to accept an autopsy report in the case of internal injury.

Mrs. Savage seeks to use this privilege as the means of cancelling all the conditions out of the policy. To accomplish this she relies on the fact that cremation rendered an autopsy impossible. To permit such a result would impose on the company a penalty for its willingness to relax the requirement of a contusion or wound in a case where the injury is internal.

Mrs. Savage's contention based on the theory that an autopsy was excused is so devoid of merit that if the Circuit Court of Appeals had in fact ignored it, the Court would have been fully justified in doing so. But the Court pointed out that "there was no autopsy" (Tr. p. 298). That in itself sufficed to dispose of this aspect of the case.

7. The only authority on the point rejects the contention that compliance with the autopsy provision can be dispensed with or excused.

In *Fidelity Mutual Life v. Powell*, 74 Fed. (2d) 525 (C.C.A. 4th Circ.), involving an identical clause, the company admitted that the insured died of carbon monoxide asphyxiation resulting from accidental means.

On that ground the beneficiary contended that it was unnecessary to show that the injury was revealed by an autopsy. The District Court so ruled. But the judgment was reversed. The Circuit Court held:

> We can take judicial notice of the fact that carbon monoxide asphyxiation results in internal injuries, and that such internal injuries are revealable by autopsy; but in the case of this insured they were not "revealed by an autopsy." This is what is required, in language as plain as any of which our English speech is capable, to take the case out of the requirement of proof of a visible wound or contusion on the exterior of the body. The learned counsel for appellee in their supplemental brief have suggested that the language should be construed to mean "disputed internal injuries revealed by autopsy"; but it would be necessary to interpolate even more than this and to construe the exception as though it read "internal injuries which, if they are disputed, shall be revealed by an autopsy." To give the language either of the suggested interpretations, however, would be to make a different contract for the parties in the light of what we think they ought to have meant, not to construe the perfectly clear language that they have used. (p. 526).
>
> . . . . . .

> Such a requirement is a safeguard against fraud and mistake; and, where the parties have thus provided that the policy shall cover accidental death from internal injuries revealed only in this particular way, it does not cover death resulting from internal injuries not so revealed, no matter how indisputably established. The question is not merely one of proof, but of policy coverage; and the coverage is certainly not extended by an admission that death resulted from a cause which the policy does not cover (p. 527).
>
> . . . . . .
>
> The admission on the trial that insured's death resulted from a cause which could be judicially noticed as an internal injury, not only could not extend the coverage of the policy, *but could not amount to a waiver of the proof of injury required as a condition precedent to recovery.* (p. 527).

Thus, the Powell case holds that the insurance company's admission of an internal accidental injury does not excuse the requirement that it be revealed by an autopsy.

Yet, petitioner asserts (brief, page 19) that the Powell case supports her contention. Obviously, the reverse is true.

Furthermore, in the case at bar the insurance company did not admit that there was an accidental internal injury. This issue was contested at the trial and on the appeal.

Petitioner also cites to this point *Warbende v. Prudential,* 97 Fed. (2d) 749 (C.C.A. 6th Circ.). As

the extract set forth at pages 20-21 of petitioner's brief discloses, there is nothing in the Warbende case to support the theory of excuse from compliance with the requirements of the policy. The case merely decides that either an autopsy or evidence of visible contusion or wound will suffice.

Lewis v. Brotherhood, 79 N. E. 802 (Mass.) cited at pages 18-19 of petitioner's brief is not in point. The case is not concerned at all with the subject of autopsy or the requirement that an internal injury be so revealed. The question there was whether the policy required a contusion or wound in case of drowning. There were two conflicting clauses on the subject. So the Court resolved the conflict in favor of the insured. And in doing so, the Court pointed out that there would be little logic in requiring a wound in a case of drowning.

At page 16 of her brief, petitioner cites several cases to the point that if cremation occurs without knowledge by the beneficiary of the terms of the insurance policy, compliance with the autopsy provisions is excused.

But none of these cases is concerned with the stipulated conditions to coverage. For example, *Ells v. Order of United Travelers,* 20 Cal. (2d) 290, involved the question of forfeiture of the insurance policy. The defendant claimed a forfeiture because of violation of the provision that advance notice be given of an autopsy and cremation. Under the circumstances of the case the Court refused to enforce the forfeiture, relying on the familiar principle:

> It is well settled in this state as well as in other jurisdictions that forfeitures are not favored by either courts of law or equity. (p. 301).

Obviously, a forfeiture clause is entirely different from a provision stipulating the essential conditions to coverage and liability.

Petitioner's brief (page 16) also cites *Trueblood v. Maryland Casualty Co.*, 129 Cal. App. 102. The autopsy aspect of that case is just as remote as that in the *Ells* case. Immediate notice of accidental death was given to the insurance company and instructions were requested. Three days later a representative of the company went to the place where the funeral was held for the purpose of investigation. But he made no request for an autopsy. The Court held that this was a waiver of the company's right to an autopsy and that a forfeiture could not be enforced for failure to comply with a subsequent demand.

Ocean Accident Co. v. Schachter, 70 Fed. (2d) 28, and *Travelers v. Welsh,* 82 Fed. (2d) 799 (cited at page 16 of petitioner's brief) were also cases in which the company sought to forfeit because of non-compliance with the provision for an autopsy on demand. Hence, they are not in point.

The difference between a provision according a right to an autopsy and a condition precedent to coverage and liability is clearly stated in *Fidelity Mutual v. Powell,* 74 Fed. (2d) 525 (C.C.A. 4th Circ.) as follows:

> The contention that, if the company desired an autopsy, it should have demanded one under the

provision of the policy giving it that right, is without force. That provision furnished additional protection to the company in the event of a dispute as to the cause of death in a case covered by the policy; but it did not enlarge the coverage of the policy so as to embrace death from internal injuries not revealed by autopsy, nor did it dispense with the proof required as a condition precedent to recovery (p. 528).

8. The Circuit Court's decision that pallor and blue lips do not constitute a contusion or wound is sound in principle and is in accord with all other authority on the point.

Apt language has been adopted in the policy to ensure that the company will be called upon to pay only in meritorious cases of injury by accidental means where the evidence is such as to leave no room for speculation.

There is nothing unfair or unreasonable in requiring a visible contusion or wound as evidence of the injury in cases where internal injuries are not revealed by an autopsy. Generally, injuries caused by accidental means are attended by lacerations and bruises which are plain and evident.

The words "contusion" and "wound" are readily defined and easily understood. The dictionary definitions are set forth in the opinion of the Circuit Court. The words are neither uncertain nor ambiguous (*Travelers Insurance Co. v. Ansley,* 124 S. W. (2d) 37, 42).

Pallor and blue lips are, obviously, transitory signs. Such changes of color are controlled by the circulation of the blood and its proximity to the surface of

the body. Pallor and blueness are produced by fright, nervousness, or exposure to extremely low temperature, just as a flushed face will be caused by excitement, embarrassment or emotional upset.

These manifestations are called "reversible." They are occasional. They come and go as electric light at the turning of a switch. They are produced by diminution of oxygen in the blood—the manifestation of which is called cyanosis, a derivative of a Greek word meaning blue.

On the other hand, a contusion of the flesh or tissue persists for a substantial period of time. It is not ephemeral. The disintegration of or damage to the tissue must be repaired in order that the affected portion of the body be restored to its normal appearance.

This is clear and unmistakable difference between a contusion and a momentary change of color. Under no conceivable theory can the manifestations involved in the case at bar be held to constitute a contusion or wound.

The decisions of other courts are in complete accord with that at bar.

The *Stanfield* case (151 Fed. (2d) 776 (C.C.A. 10th Circ.) (Cert. denied, 90 Adv. Op. 732) has been cited above.

Other decisions and the manifestations involved are as follows:

Travelers Insurance Co. v. Ansley, 124 S. W. (2d) 37 (Tenn.), second appeal, 173 S. W. (2d) 702: Death from taking poison by mouth:

Manifestations:

A condition of shock, and he had *pallor* and a thready pulse. . . .

His face was *very pale,* and his head was drawn back, and his mouth was wide open and his lips were swollen; that his eyes were glassy, sunk in his head.

. . .

His lips were mighty blue. . . .

His face "was *blue all over.* His lips were dark, real dark *blue,* or *purplish*" (173 S. W. (2d) p. 703).

Judgment on verdict for Ansley reversed and cause remanded on first appeal; on second trial verdict directed for the insurance company and judgment thereon affirmed (p. 703).

Paist v. Aetna, 60 Fed. (2d) 476 (C.C.A. 3rd Circ.): Death from sunstroke.

Manifestations:

"Flushed, sunburned face" (p. 477).

Judgment for the insurance company on a directed verdict affirmed.

Dupee v. Travelers, 2 N. Y. Supp. (2d) 62, affirmed 16 N. E. (2d) 391: Death from sunstroke with acute heart condition.

Manifestations:

"The insured's face and head were *very red* redder than usual, and his face was somewhat swollen" (16 N. E. (2d), p. 392).

Judgment for Dupee vacated and complaint dismissed (id. p. 392).

Bender v. Ridgley Protective Assn., 257 N. Y. Supp. 1004; affirmed by Court of Appeals at 188 N. E. 120: Death from sunstroke.

Manifestations:

> Pale, cold clammy and bathed in profuse perspiration (See Dupee v. Travelers, 2 N. Y. Supp. (2d) 62, 65).

Judgment of the trial Court in favor of the beneficiary "reversed on the law" and complaint dismissed.

Lavender v. Volunteer Life, 157 So. 101 (Miss.): Death resulting from a scuffle.

Manifestations:

> Lavender "began to turn *pale* . . . he turned *deathly pale* and became very sick; that his facial expression reflected that he was suffering from intense pain and his body was drawn with pain . . . after making an incision found his abdomen filled with blood from a ruptured spleen" (p. 103).

Judgment for defendant affirmed.

It would unduly prolong this brief to quote at length from the opinions in the cases cited. Appropriate extracts will be set forth in the appendix.

9. Contrary to the assertions in the petition, there is no case holding that the manifestations exhibited by Mr. Pistolesi constitute a contusion or wound.

In no case has it been decided that the symptoms of a heart attack or coronary occlusion constitute a contusion or wound.

In no case has it been decided that the manifestations of pallor and blue lips—no matter what the cause—constitute a contusion or wound.

Those federal cases cited in the petitioner's brief which discuss this subject hold that the process by which the contusion is produced may be internal. They hold that to satisfy the requirement of a contusion the internal processes must produce morbid changes in or injuries to the subcutaneous tissues or skin which evidence themselves by discolorations on the exterior of the body.

The cases in which the plaintiff prevailed on this theory involved death from carbon monoxide poisoning, sunstroke, or poison taken by mouth.

None of these cases involves a coronary thrombosis or coronary occlusion. In none of them were the manifestations limited to pallor and blue lips—conditions which obviously do not involve any morbid change in or injury to the subcutaneous tissues or skin.

Three of the cases cited by the petitioner (brief, pages 29-31) were decided by the Seventh Circuit Court: *Warbende v. Prudential*, 97 Fed. (2d) 749; *Mutual Life v. Schenkat*, 62 Fed. (2d) 236; and *Wiecking v. Phoenix*, 116 Fed. (2d) 236. Another federal case—*Huss v. Prudential*, 37 Fed. Supp.

364—was decided by the District Court of Connecticut.

The *Warbende* case involved carbon monoxide poisoning.

The *Schenkat* case involved poison taken by mouth.

The *Wiecking* and *Huss* cases involved sunstroke.

In the *Wiecking* case the manifestations are not mentioned. In the *Warbende, Schenkat* and *Huss* cases the decision is based on the presence of large scarlet or blue blotches over the surface of the body, which were caused by decomposition of tissue cells producing a morbid change in the subcutaneous tissue.

The leading case on this point is *Warbende v. Prudential.* There medical testimony explained the process by which the cells were decomposed and the morbid injury to the subcutaneous tissue produced. The testimony clearly demonstrated that there was such morbid injury and the Court held that this sufficed.

In the case at bar there was no such testimony and no such manifestation. The only testimony on the subject—and it was uncontradicted—was to the contrary. The insurance company's medical expert explained that the pallor and blue lips exhibited by Mr. Pistolesi did not involve any injury to the subcutaneous tissue or skin or any effusion of blood beneath the skin (Tr. 239-41).

In the *Warbende* case the blotches on the body—produced by morbid injury to the subcutaneous tissue—were persistent and lasting. Such manifestations continue until death. The poison in the system pro-

duces a physiological deterioration which works its way to the surface of the body. There is no such process in the case of a heart attack such as Mr. Pistolesi sustained.

If the Court should care to verify the foregoing analysis, the appendix to this brief may be consulted. There the pertinent portions of the Warbende opinion are set forth.

As to the other cases cited by petitioner (brief, pages 29-31) to support the contention that pallor and blue lips constitute a contusion or wound, the policy provisions, the manifestations involved, and the reasoning of the courts, will be set forth in the appendix to this brief. It will there be demonstrated that none of these decisions is in point.

One of these citations—*Gasperino v. Prudential,* 107 S. W. (2d) 819 (Mo.), (see petitioner's brief, page 29)—need not be considered because the opinion of the Kansas City Court of Appeals was later quashed by the Supreme Court of Missouri *(State ex rel. Prudential v. Shain,* 127 S. W. (2d) 675.)

10. Although the precise question has not been decided in the state courts of California, every indication from that source leads to the conclusion that the provisions of this policy would be held clear, certain and unambiguous, and would be construed to mean precisely what they say without distortion or strain in order to impose liability on the insurance company.

The principles governing the interpretation of insurance contracts have been squarely adjudicated by the California courts.

There are some jurisdictions in which undue effort is made to find ambiguity in language that is clear and plain. In those states insurance contracts and their text are strained and distorted so as to find ground to justify liability. The process is not one of interpretation, but one of unjust enrichment of the policyholder, or his beneficiary, at the expense of the insurance company—or in the case of a mutual company (such as defendant), at the expense of the other policyholders.

The Supreme Court of California has vigorously opposed this trend. In *Blackburn v. Home Life Insurance Co.*, 19 Cal. (2d) 226, it was held:

> Because contracts of insurance are not the result of negotiation and are generally drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured (citing cases). Where there is no ambiguity, however, courts will indulge in no forced construction against the insurer, and the insurance policy, like any other contract, is to be interpreted according to the intention of the parties as expressed in the instrument in the light of the circumstances surrounding its execution (p. 229).

The California Supreme Court has also recognized the right of an insurance company to determine the kind of contract it will make and to have that contract enforced according to its terms. This principle was applied in *Coit v. Jefferson Standard Life*, 28 Cal. (2d) 1. There the Court quoted from a Missouri case as follows:

> The insurance company has the right to decide the kind of a contract it will enter into (p. 8).

The *Coit* case is the most recent expression of opinion of the California Supreme Court concerning the interpretation of insurance contracts. The majority opinion (in which six out of seven justices concurred) closes with a quotation of the language from the *Blackburn* case (19 Cal. (2d) 226, 9) which is set forth above, and which warns the courts of the state against indulgence in forced construction against the insurer, if no ambiguity exists.

The single dissenting justice in the *Coit* case charges the majority with adopting a "more conservative view"—a comment which should be helpful to the federal courts in the exercise of their function to expound the law of California.

It is noteworthy that the U. S. Supreme Court has declared the same principle in *Bergholm v. Peoria Life Insurance Co.*, 284 U. S. 489, 76 L. Ed. 416. After explaining the reason for resolving ambiguities in favor of the policyholder, the Court held:

> . . . This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings.
>
> Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense. . . . And to discharge the insured from the legal consequences of a

> failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief by the insurer, would be to vary the plain terms of a contract in utter disregard of long settled principles (76 L. Ed. 419).

The courts of California refuse to import ambiguity into a policy of insurance. An effort toward that end was made and frustrated in *Greenberg v. Continental Casualty Co.*, 24 Cal. App. (2d) 506 (hearing in Supreme Court denied). There, the word "insurability" was involved. The Court held:

> With regard to the first decisive question above mentioned, there is no merit to the claim that the word "insurability" is ambiguous, unless it be charged that the English language is hopelessly inadequate and insufficient to express human thoughts. Indeed, the word is so simple—constructed as it is just as hundreds of other words are constructed—that its derivation scarcely warrants attention . . . The word insure, in Webster's New International Dictionary, second edition, is defined as, "to assure against a loss by a contingent event, on certain stipulated conditions, or at a given rate or premium; to give, take, or procure an insurance on or for; to enter into, or carry, a contract of insurance on" (p. 514).

The Court concludes:

> The word is in general use, and has but one meaning which is in no sense technical. Neither by definition nor by rule can its meaning be restricted to signify only "good health." The contracting parties must be assumed to know the English language, at least the common words,

> otherwise the courts would be continually called upon to define and interpret words, the definition and meaning of which can be found in every authoritative English dictionary. Because of the failure of the authorities relied upon by appellant to recognize this simple truth, namely, that the word "insurability" is not ambiguous, the reasoning followed in such cases is logically unsound. To assume, as those authorities do assume, that the word is ambiguous is to adopt a false premise, and, from the standpoint of logic, to proceed with argument from a false premise can lead to but one conclusion, namely, a conclusion that is logically unsound (pp. 514-15).*

In *Coit v. Jefferson Standard Life*, 28 Cal. (2d) 1, a war risk exclusion rider was involved. It provided that there should be no recovery, except return of premiums in case of death occurring "from any cause while the insured is serving outside the states of the United States . . ." (p. 3).

This clause was held to apply to death in Alaska of a member of the armed forces resulting from an embolism following an appendectomy. The opinion declares:

> We are satisfied (that) paragraph 2 is free from any ambiguity or uncertainty, and that it means precisely what it says (p. 4).

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*In a subsequent decision the Supreme Court of California stated that the decision in the *Greenberg* case was correct, but disapproved the ruling on another point involving the duty of the insurance company to avoid arbitrary action in considering evidence as to insurability. As to the factor of ambiguity, the *Greenberg* case has never been questioned (*Kennedy v. Occidental Life Ins. Co.*, 18 Cal. (2d) 627, 634-5).

Then, after analyzing the clause, the opinion says:

> This seems to be the plain and natural meaning of the language (p. 4).

Section 1644 of the Civil Code of California declares:

> The words of a contract are to be understood in their ordinary and popular sense.

Hence, there can be no doubt but that the California courts would give the same interpretation to this policy as it has received from the Circuit Court of Appeals, one of whose members and the author of the opinion—Judge Denman—had during long years of practice which preceded his judicial appointment attained an outstanding position as a member of the California bar.

Petitioner refers (brief, page 33) to the principle that an insurance policy "susceptible of two constructions" will be interpreted in favor of the beneficiary. This is the rule in California. But, as above appears, the double-indemnity clause is clear and unambiguous.

One other ground is advanced by the petitioner in her effort to forecast the views of the California courts on this issue. This is based on *Trueblood v. Maryland Insurance Co.*, 129 Cal. App. 102.

The policy in the Trueblood case contained no requirement of any manifestation whatever as evidence of the injury. Hence, the case has no bearing on the question at bar.

As originally printed, petitioner's brief (page 31) referred to the Trueblood opinion as "not disclosing whether the contusion or wound limitation was one of the policy's terms."

Later, the petitioner corrected the text so as to read:

> In an opinion not involving the contusion or wound limitation as one of the policy's terms. . . .

That is the fact. There was no contusion or wound requirement in the Trueblood policy. Hence, the California Court held that no contusion or abrasion was necessary to recovery.

Obviously, a decision based on a policy that contains no such requirement does not indicate that the Court would render a similar decision with respect to a policy in which a contusion or wound is required as evidence of the injury.

When the petitioner discovered her mistake concerning the contents of the policy in the Trueblood case, she should have realized that the decision is of no value and abandoned the contention based upon it. Since she has not done so, we shall answer the remainder of petitioner's argument on the point.

Petitioner (brief, pages 32-33) points to the fact that the *Trueblood* case cites *Horsfall v. Pacific Mutual,* 72 Pac. 1028 (Wash.). But the point of the citation is not concerned with the contusion or wound aspect. It involves another and independent issue, viz.: whether acute dilatation of the heart "as a direct result of accidentally falling into a whirlpool of

water" (129 Cal. App. 108) made a case of accidental means.

It is in this connection that the Trueblood opinion cites the *Horsfall* case which also involved a dilatation of the heart (see 129 Cal. App. 108).

The Horsfall policy contained an exception clause providing that "this insurance does not cover . . . injuries . . . of which there are no visible external marks upon the body . . ."

The *Horsfall* opinion discusses the meaning of this clause. But this discussion is not mentioned by the California Court in the *Trueblood* case for the obvious reason that the subject is immaterial to any issue involved in the *Trueblood* case.

Because the California Court cites a decision with respect to one material aspect does not result in the approval or adoption of other and immaterial aspects of the cited authority.

Furthermore, the exception clause in the Horsfall policy did not require a contusion or wound. It excluded coverage if there were "no visible external marks upon the body." The difference is clear. It is explained at length in the Stanfield opinion (151 Fed. (2d) 776) quoted in the appendix to this brief; also in *Travelers v. Ansley,* 124 S. W. (2d) 37, 41-42 (Tenn.).

Petitioner also cites *Hill v. Great Northern Life,* 58 Pac. (2d) 405 (Wash.). There again, according to the policy "marks or evidences of injury" sufficed as well as a contusion or wound. As petitioner's brief

(page 32) discloses, the clause in the Hill policy excluded coverage of injuries "of which there shall be no visible contusion, wound, *or other marks or evidence of injury* on the exterior of the body" (p. 406).

We conclude that all indications found in the California decisions point to a concurrence with the view of the Circuit Court of Appeals in its interpretation of the double-indemnity clause at bar.

11. There was no conflict of evidence on the issue of contusion or wound and, therefore, the determination of the issue was for the Court.

The petitioner contends that the jury decided an issue of fact and, therefore, the Appellate Court was bound by the finding that the injury was evidenced by a contusion or wound.

The answer is that there was no conflict in the evidence. Authority for this statement is found in five of the six cases cited above in section 8 of this brief. In four of the cases, judgment in the trial Court was for the beneficiary. It was reversed on the ground that there was no evidence to support the finding of contusion or wound. In one case—*Paist v. Aetna Life,* 60 Fed. (2d) 476 (C.C.A. supra)—a judgment for the insurance company on a directed verdict was affirmed.

The physical facts are undisputed. The only question is whether they satisfy the policy requirement. That question must be determined by the Court. The Circuit Court's opinion states:

> Appellee gave no evidence of any wound and we think none of a "contusion" (Tr. p. 298).

The burden was on Mrs. Savage to show that the injury was so evidenced. She produced no such evidence. Hence, there was no escape from a judgment for the company notwithstanding the verdict. As the Circuit Court's opinion states:

> Our conclusion that appellee's burden of proof of contusion has not been sustained by the evidence of pallor and blue lips is in accord with the decision on the identical facts in the case of Paul Revere Life v. Stanfield (C.C.A. 10), 151 F. 2d 776, 777, where the court construed the same policy provision (Tr. p. 301).

The petitioner misconceives the situation. She propounds the question:

> May an Appellate Court arrive at a conclusion opposite to that of the jury simply and exclusively by reliance upon expert opinion testimony as to the meaning of wording in the policies . . . (petition, p. 8).

The Circuit Court's decision is not based "simply and exclusively" on expert testimony. It is based on the absence of any evidence to justify recovery by Mrs. Savage.

In referring to the medical testimony, the Circuit Court says that it "corresponds with the dictionary definitions" (Tr. p. 300).

Petitioner's quotation (brief, pp. 22-23) from the medical testimony is incomplete. She omits the most significant portion which is set forth in the Circuit Court's opinion, viz.:

> A. Blueness of the skin is a result of the oxygen content of the blood—veinous blood is

blue and the oxygenized blood is red. When the heart action is insufficient and the blood is not pumped properly and sufficient oxygen does not enter the blood, that imparts a blue color or character to the skin, the blood becomes blue, and that imparts the color to the skin. There is no damage and there is no wound or contusion.

Q. Is there any damage to the subcutaneous tissue?

A. There is not.

Q. In the case of pallor is there any damage to the subcutaneous tissue?

A. There is not.

Q. In case of pallor is there any effusion of blood beneath the skin?

A. No.

Q. In case of blue lips is there any effusion of blood beneath the skin?

A. No (Tr. p. 300).

This testimony was properly admitted. It is a scientific explanation of the symptoms. Not only was it uncontradicted, as the Circuit Court points out, but it is obviously not open to contradiction.

This testimony does not convert the issue into a jury question. It corroborates the Circuit Court's conclusion that there was no evidence of a contusion or wound.

12. The Circuit Court properly directed entry of judgment for the insurance company.

Defendant (respondent here) moved for judgment n. o. v. (Tr. p. 23) and seasonably specified as error the District Judge's denial of the motion (Tr. p. 49, paragraphs 1 and 2; Tr. p. 292). Among the grounds

specified was the absence of evidence of a contusion or wound.

This subject was investigated in depositions, by interrogatories under Rule 33, at the pre-trial conference, and finally at the trial.

On each of these occasions the inadequacy of the manifestations was pointed out and it was brought into even sharper focus when appellant moved for a directed verdict, and thereafter for judgment n. o. v. If the petitioner had anything to add to her case, she would have done so when the opportunities were thus presented.

The petitioner had ample opportunity to produce medical testimony explaining the symptoms, if any favorable testimony on that point had been available. The petitioner relied heavily in the trial court on the *Warbende* case (97 Fed. (2d) 749, supra) where the decision was based on medical testimony concerning the manifestations there involved. The petitioner had a medical expert in court who gave testimony on the issue of accident and whose silence on the contusion issue shows that he could not assist petitioner in that respect.

That the District Judge was unable correctly to determine the issue should not be made the basis for requiring a second trial. Such a trial would result in a directed verdict for the defendant and, therefore, no good purpose could be served by postponing the inevitable outcome, and delaying the final disposition of the case.

The propriety of the mandate directing judgment for defendant is supported by the cases cited in the opinion (Tr. p. 301). It is in accord with the recent decision of the Supreme Court (*Clone v. Virginia Pulp Co.,* 91 L. Ed. Adv. Op. 683) where the power to direct a judgment was denied because of the failure of the appellant to present a motion for judgment n. o. v. Here, such a motion was made and, therefore, the Circuit Court's power is beyond question.

It is also noteworthy that in one of the cases cited by the Circuit Court (Tr. p. 301)—*Connecticut Mutual Life v. Lanahan,* 113 Fed. (2d) 935—the same procedure occurred as in the case at bar. The original judgment of the Circuit Court reversed and remanded the cause for a new trial. Then on application of the insurance company, the mandate was amended so as to direct entry of judgment for the company.

Accordingly, we submit not only that no ground for certiorari has been presented, but that on its merits the decision of the Circuit Court is correct.

Dated, San Francisco, California,
July 3, 1947.

Respectfully submitted,
DAVID LIVINGSTON,
LOUIS F. DIRESTA,
Attorneys for Respondent.

(Appendix Follows.)

EXTRACTS FROM OPINIONS HOLDING THAT MANIFESTATIONS SIMILAR TO OR MORE EXTENSIVE THAN THOSE IN THE CASE AT BAR DO NOT CONSTITUTE A CONTUSION OR WOUND.

Paul Revere Life Insurance Co. v. Stanfield, 151 Fed. (2d) 776.

> The deceased became pale and remarked that he felt a "hot spell or something" coming over him; he immediately went to bed; his clothes were wet with perspiration; he complained of smothering to death and of pains in his arms; his face was a pale yellow color and his lips were blue and swollen; the pupils of his eyes were dilated, and his eyes were glassy; he vomited blood practically the entire time, and hot fluid flowed from his nose; and just before death occurred his "skin had turned blue practically all over his body."
>
> Do any of these symptoms constitute a visible wound or contusion upon the exterior of the body? We think they do not. Many of the cases upon which appellee relies to sustain the judgment are not helpful because the proviso considered therein was quite different from the one in question here. They arose under provisions which required a visible mark or evidence of injury, or language meaning substantially that. Under such proviso we would have no difficulty in concluding that there were visible marks and evidence of an injury. But this proviso requires a wound or contusion on the exterior of the body. A number of courts have considered similar provisos where the facts were substantially the same,

and as in many such cases, have reached different conclusions. In Wiecking v. Phoenix Mutual Life Ins. Co., 7 Cir., 116 F. 2d 90; Huss v. Prudential Ins. Co. of America, D. C., 37 F. Supp. 364; American Nat. Ins. Co. v. Fox, Tex. Civ. App., 184 S. W. 2d 937, and Warbende v. Prudential Ins. Co. of America, 7 Cir., 97 F. 2d 749, 117 A. L. R. 760, the courts held that substantially the same facts met the requirements of similar provisos in the policies, while in Paist v. Aetna Life Ins. Co., D. C., 54 F. 2d 393, affirmed 3 Cir., 60 F. 2d 476; Pope v. Lincoln Nat. Life Ins. Co., 8 Cir., 103 F. 2d 265; Dupee v. Travelers Ins. Co., 278 N. Y. 659, 16 N. E. 2d 391, and Travelers Ins. Co. v. Ansley, 22 Tenn. App. 456, 124 S. W. 2d 37, the courts held similar facts insufficient to meet the requirements in similar provisos.

The parties were free to make their own contract, and it is our duty to give effect thereto. Where language is clear and unambiguous and has a well defined meaning, the presumption must be that the parties used such words in their ordinary and well understood meaning. Courts are not justified in adopting strained or technical or unnatural definitions of words in order to swing the pendulum one way or the other.

The words "wounds" and "contusions" have well defined, generally accepted and understood meanings. The commonly understood and accepted meaning of the word "wound" is an injury to a person in which the skin or other membrane is broken, as by violence or surgery. See Travelers Ins. Co. v. Ansley, supra; Webster's New International Dictionary, Second Edition. These au-

thorities, as well as others, likewise define "contusion" as a bruise affecting subcutaneous tissue, without breaking the skin. "Contusion," in its ordinarily accepted meaning, is synonymous with "bruise." It is difficult to think of pallor, perspiration, dilated pupils, or a bluish tint to the skin immediately preceding death as either wounds or contusions. To so hold would, in our opinion, do violence to the ordinarily accepted meaning of these terms as they are understood by intelligent persons.

We think it must be presumed that when the parties used these terms in their contract, they used them as they are commonly and ordinarily understood. In the absence of any guidance from the Supreme Court of Oklahoma we choose to follow those decisions which hold manifestations such as outlined above insufficient to constitute a wound or contusion upon the exterior of the body. The judgment of the trial court is reversed and the cause is remanded, with directions to enter judgment for the defendant. (p. 777).

Paist v. Aetna Life, 60 Fed. (2d) 476.

In its opinion the court below said: "I am also of the opinion that there is no evidence in this case of a visible contusion or wound upon the exterior of the body. To hold that a flushed, sunburned face is a wound or contusion would be straining language far beyond any reasonable meaning which could be assigned to it. It might be just possible to bring it under the definition of wound given by the Century Dictionary as the meaning of the word in medical jurisprudence and cited by the plaintiff, but in insurance poli-

cies courts have again and again refused to adopt technical definitions and have adhered to the ordinary and popular meanings of words used. There is no reason why this rule should not work both ways. Certainly in ordinary parlance 'contusion' is almost exactly synonymous with 'bruise', and to say that a flushed countenance is a wound would go beyond the limit of allowable interpretations." 54 F. (2d) 393, 395.

We find no error in such view. We are here dealing with a written contract in which the parties agreed that the accident against which the insured was indemnified was one "evidenced by a visible contusion or wound on the exterior of the body." These words "contusion", "wound", "visible on the exterior of the body", are of well-known commonly understood meaning. "Contusion," which has its Latin origin, "con" and "tundere", to strike, means a bruise or wound caused by a blow, but where, as here, no physical blow is struck, where there is no bruising, where the skin is not blow-bruised or blow-broken, certainly, in common speech and common understanding, the death of the plaintiff's husband from sunstroke cannot be said to be "evidenced by visible contusion or wound on the exterior of the body". (p. 477)

Travelers Insurance Co. v. Ansley, 124 S. W. 37.

In no view of the question do we think it can be said that the fact that the insured "went into a deep sleep", or the fact that "his mouth flew open and he snored", was a "contusion or wound" evidencing the injury which resulted in the insured's death. So, if the plaintiff's view be

sustained it must be on the theory that the pallor of his face, coupled with the fact that his head "was drawn back", met the requirements of the policies in this respect.

There is some justification for the conclusion that such a condition is an external "sign or mark" within the meaning of a policy provision employing those terms in the connection here under consideration and it appears to have been expressly so held. Note: 39 A.L.R. 1011. But we think to hold that it was a "wound or contusion" would be a clear perversion of the ordinary meaning of plain language. If the coverage had been limited to death from an injury of which there was no visible and external wound or contusion, as could have been done had the parties so desired, and the insurer was here defending on the theory that the pallor of the insured's countenance and his drawn head was a "wound or contusion", it can readily be imagined the dispatch with which it would be repelled on the ground that no such strained and unnatural construction of language would be permitted because clearly not intended by the parties when they employed the terms. This being true, the result must be the same where the resort to such a construction is by the insured rather than the insurer, for obviously the terms of the policies cannot be said to have meant one thing in regard to the latter and another in regard to the former. They must have meant the same to both the parties; otherwise there would have been no contract.

The rule which forbids the imputation of an unusual meaning to language used in an insurance

or other contract applies as well when invoked by one party as by the other. In cases involving insurance policies its application does not depend upon which of the parties, whether insured or insurer, will benefit by the result. Great Eastern Casualty Co. v. Solinsky, supra.

The words "contusion" and "wound" involved in the instant case are of well known, commonly understood import (Paist v. Insurance Co., supra) which must be given effect. There is, we think, no reasonable basis for the view that a pallid face and drawn head are within that meaning. We think the average person would be amazed to hear that any such significance could be ascribed thereto. To say that such a condition was a wound or contusion would be an excellent illustration of a strained and unnatural construction of terms having a common, ordinary meaning and which were obviously used in that sense. Paist v. Ins. Co., supra; see also: Lavender v. Ins. Co., 171 Miss. 169, 157 So. 101. (pp. 42-3).

Travelers v. Ansley, 173 S. W. (2d) 702.

Reverting to the facts of the case at bar, apart from the scratch on the insured's leg, the condition relied upon as constituting a wound or contusion was that just prior to his death the insured's face was pale and his lips were somewhat swollen and blue. We do not think either condition was within the common, ordinary meaning of the words "wound or contusion." A pale face and swollen, blue lips might be regarded as indicating, and as a sign of, an internal disorder or even an injury, but we cannot conclude that either is of itself a wound or contusion

within the ordinary meaning of those words, especially in the absence of any expert evidence on the point. Incidentally, the record before us furnishes very good proof that this is true, so far as laymen are concerned. For instance, the plaintiff was asked by her counsel if she saw any wound or cuts or contusions on him anywhere, and she replied "No." Another lay witness, Mr. Tapp, who also undertook to testify as to the conditions on the exterior of the body, was asked, "Did you see any contusion or wound on him anywhere?" to which he responded, "No sir." It is fair to assume from their testimony and station in life that these witnesses were in fact above the average in intelligence, and that they understood the ordinary meaning of the words "wound and contusion". It is perfectly clear that it never occurred to either that the conditions relied upon as meeting the policy requirement were within the ordinary meaning of these words, or either of them. Their conclusion is of course not binding on us. We refer to it only as indicating the understanding of the ordinary layman with respect to the meaning of the words. In this connection it is worth noting that the plaintiff did not ask the attending physician, whom she introduced, whether there was a wound or contusion on the exterior of the body. (p. 705).

Dupee v. Travelers Insurance Co., 16 N. E. (2d) 391 on appeal.

The evidence disclosed that insured died from sunstroke with an acute heart condition as a secondary cause of death. . . . On July 2d, which was a hot humid day, he was on his way home

in an automobile at about 4:30 in the afternoon. He fainted in the automobile and was taken to a hospital, where he was treated for sunstroke, and died the next day. The insured's face and head were very red, redder than usual, and his face was somewhat swollen. The doctor who treated the insured testified that sunstroke or sunburn is a first degree burn, and that "inasmuch as a burn is considered a wound, and sunburn is considered a burn, it must be considered a wound". The defendant claimed that there was no proof that the death was caused in a manner contemplated by the contract.

From a judgment of the Appellate Division, 253 App. Div. 278, 2 N.Y.S. 2d 62, which reversed an order of the Appellate Term, vacated a judgment of the City Court and dismissed the complaint on the ground that there was no evidence of a visible "contusion" or "wound" on the exterior of the body of the insured within the additional indemnity contract of the life policy, plaintiff appeals after his motion for reargument was denied, and his motion for leave to appeal to the Court of Appeals was granted by the Appellate Division, 254 App. Div. 566, 3 N.Y.S. 2d 901.

Affirmed. (pp. 391-2)

Dupee v. Travelers Insurance Co., 253 App. Div. 278, 2 N. Y. S. (2d) 62.

As to whether or not there was a visible contusion or wound on the exterior of the body, the testimony is that the insured's face and head were very red, redder than usual, and his face was somewhat swollen. The doctor who treated

the insured testified that sunstroke or sunburn is a first degree burn; and further "Inasmuch as a burn is considered a wound, and sunburn is considered a burn, it must be considered a wound."

On cross-examination the doctor testified:

"Q. You just testified that he had a sunburn, first degree? A. Yes.

Q. That is the mildest kind of a burn, is it not? A. Yes.

Q. It is just a redness that all of us experience when we are out in the open and the sun rays beat down upon us in the summer time? A. Yes.

Q. You didn't see any visible cut or wound, did you? A. No.

Q. And the skin was not broken? A. No."

Another physician, testifying as an expert, gave an opinion that sunburn is considered a first degree burn, and a first degree burn is medically considered a wound. (p. 64)

The Court held that such evidence did not satisfy the requirement of the policy:

> There does not appear to be in any jurisdiction a decision which holds that the effects of sunstroke constitute proof of "a visible contusion or wound on the exterior of the body". On the medical testimony in this action it could be found that doctors would consider sunburn a wound", but the courts have stated repeatedly that the language in insurance policies is not to be construed like words of art, but is to be given such meaning as the average policy-holder, as well as the insurer, would attach to it. Paist v. Aetna Life Insurance Co., 3 Cir., 60 F. 2d 476,

477; Johnson v. Travelers' Insurance Co., 269 N. Y. 401, 407, 408, 199 N. E. 637; Abrams v. Great American Ins. Co., New York, 269 N. Y. 90, 92, 199 N. E. 15. (p. 64)

. . . . . .

The most reasonable and unstrained construction of the policy in suit therefore, would seem to be that it does not contemplate that a very red face and head, with the face somewhat swollen, is evidence of a visible contusion or wound on the exterior of the body. I think this conclusion must be accepted, notwithstanding that the courts are disposed to construe policies of insurance liberally and most favorably to beneficiaries, and that there are decisions that have permitted recoveries in cases where no mark visible to the eyes was left on the body. These cases, however, do not involve sunstroke, nor was there a specification in the contracts that there be "a visible contusion or wound on the exterior of the body"; and the nature and extent of the holdings have been explained in Rosenthal v. American Bonding Co., 207 N. Y. 162, 100 N. E. 716, 46 L.R.A., N. S. 561. (p. 65)

Bender v. Ridgley Protective Assn., 257 N. Y. S. 1004, affirmed 262 N. Y. 685, 188 N. E. 120.

The policy has been erroneously construed. It clearly covers death and disability cases of one character only, viz., those wherein the injuries are solely those caused both accidentally and through causes not only violent, external and involuntary, but those leaving visible marks of wounds, fractures or dislocations upon the body of the insured. No such injuries were proved. (p. 1004)

Lavender v. Volunteer State Life Ins. Co., 157 S. 101.

> A careful examination of the body of the said Lavender disclosed no evidence of the injury sustained in the scuffle, such as wounds or contusions on the exterior of the body, except that immediately upon reaching home and within a few minutes after the tussle the said Lavender became nervous and *began to turn pale;* that within two hours thereafter he turned *deathly pale* and became very sick; that his facial expression reflected that he was suffering from intense pain and his body was drawn from pain; that he lay down and soon became unable to arise; that two physicians were immediately called and after attempting for several hours without effect to ease the pain, decided to perform an operation to locate the trouble, and after making an incision found his abdomen filled with blood from a ruptured spleen, the same being torn almost in two; that the spleen was in such a ruptured condition it had to be removed, and almost bled to death internally from the wound, a blood transfusion was performed in a futile effort to save his life; that within four days after the injury the said Lavender died. . . . (p. 103)
>
> . . . . . .
>
> From the agreed statement of facts, it will be seen that there was no stipulation that there was any wound or contusion visible upon the body of Lavender, and that it required an operation to determine what the injury was. (p. 104)

PERTINENT PORTIONS OF THE OPINION IN WARBENDE v. PRUDENTIAL, 97 FED. (2d) 749.

Warbende v. Prudential Insurance Co. of America (C.C.A. 7th), 97 F. (2d) 749:

The evidence discloses that there were scarlet blotches on the skin of the face and on the trunk and extremities of the deceased, and that these scarlet blotches were characteristic of carbon monoxide poisoning. The blotches constituted visible marks on the exterior of the body and were evidence that the bodily injuries, which resulted in death, were effected by carbon monoxide poisoning. But the defendant contends that the scarlet blotches were not contusions or wounds within the meaning of those words as used in the policy. In the case of Mutual Life Insurance Company v. Schenkat this court had occasion to construe the words "contusion or wound" in an accidental death provision which required that there be "evidence by a visible contusion or wound on the exterior of the body." In that case death had been caused by sodium fluoride poison. The stipulation of facts recited: "* * * lips and tongue swollen; became pale; body discolored, * * *" This court concluded that the foregoing physical marks satisfied the requirement of "evidence by visible contusion or wound on the exterior of the body."

In reaching such conclusion this court cited and quoted with approval from the case of Thompson v. Loyal Protective Association. In the policy which was involved in the Thompson case there was a provision that "* * * the injury includes only the result of external violent and accidental means leaving on the body marks of contusions or wounds visible to the naked eye." The trial

court had instructed the jury that in legal medicine the word "wounds" meant "injuries of every description that affect either the hard or soft parts of the body," and that it comprehended "bruises, contusions, fractures, luxations, etc.," and that "in law the word means any lesion of the body." The Supreme Court of Michigan held that the trial court's instruction correctly stated the meaning of the word "wounds." And it appears from the facts of that case that the contusion or wound consisted of a "discoloration of the skin, swelling and redness over the right kidney and hip;" and there was no contention that the "contusion or wound" was caused by the impact of any solid body upon the body of the deceased.

It is true that "contusion," etymologically considered, suggests an injury which is the result of the impact of a blow upon the exterior of the body. But for the purpose of our present inquiry the meaning cannot be so restricted. It is obvious that the purpose of requiring that there be a "visible contusion or wound on the exterior of the body" is to have visible, physical evidence of the operation of the "external, violent and accidental means," which are alleged to have effected the bodily injuries. In our opinion "visible contusion," as used in the policy, includes any morbid change in, or injury to, either the subcutaneous tissue, or the skin, which produce markings or discolorations that are visible upon the exterior of the body. It is not material whether the "visible contusions" result directly from the operation of the "means" upon the exterior of the body, or indirectly from internal injuries which are effected by the action of the "means". "The acci-

dental operation of external means may be wholly internal," and yet the internal injuries may extend to the subcutaneous tissue or into the layers of the skin. The visibility of the "contusion" may be due to the discoloration either of the injured tissue under the skin, or of the injured skin itself, or of both.

The scarlet blotches which were upon the exterior of the body of the insured were caused by the action of the carbon monoxide and were connected with the "internal injuries" which resulted in the death of the insured. When carbon monoxide is inhaled into the lungs it passes into the blood and combines with the hemoglobin contained in the red blood cells and cuts off the supply of oxygen to tissue cells. According to medical testimony the scarlet blotches were the result of death and decomposition of tissue cells, the death and decomposition of the cells resulting from the absence of oxygen in the red blood cells.

The Supreme Court of Illinois has had occasion to discuss and define the word "wounds." It was stated in the opinion that "in law the word means lesion of the body, and the correct definition of a lesion is a hurt, loss or injury." The word "lesion" is defined in Webster's New International Dictionary as "Any morbid change in the structure of organs or parts; hence the diseased or injured region." The Illinois Supreme Court's definition of "wound" excludes the necessity of a breaking or cutting of the skin and is broad enough to include an injury to the subcutaneous tissue and to the skin, which has resulted from carbon monoxide poisoning and is revealed by scarlet blotches.

We are of the opinion that the scarlet blotches were visible contusions or wounds within the intent and meaning of the accidental death provisions in the policies. (pp. 752-3)

ANALYSIS OF CASES CITED IN PETITIONER'S BRIEF (PAGES 29-31) IN SUPPORT OF THE CONTENTION THAT THE MANIFESTATIONS AT BAR CONSTITUTE A CONTUSION OR WOUND.

Robinson v. Masonic Assn., 88 Atl. 531 (Vt.):

The manifestations were as follows:

> The finger was badly swollen, inflamed, and reddened. It grew worse steadily, and a frog felon of the most severe kind developed (page 531).

These symptoms would probably suffice under the modern contusion and wound clause. The Court held that the word "wound . . . includes the bruise of the plaintiff's finger . . . and that the felon constituted 'external and visible marks' of the wound" (page 532).

Furthermore, as the above extract discloses, the clause merely required "external and visible marks of a wound" (page 531) which is far different from the policy at bar.

Thompson v. Loyal Protective Assn., 132 N. W. 554 (Mich.):

Policy provision: Injury includes only the result of external, violent and accidental means leaving on the body *marks of contusion or wounds visible to the naked eye* (pp. 554-5).

Under such a provision, the contusions or wounds themselves need not be visible or be on the exterior of the body. It is only required that the marks of the contusions or wounds be visible. The mark need not be a contusion or wound. Hence, the wound may be internal, provided there is an outward mark of such wound.

Manifestations: Discoloration of the skin, swelling, and a redress over the right kidney and hip (p. 555).

Such symptoms did in fact constitute marks of contusions or wounds.

People v. Durand, 139 N. E. 78 (Ill.):

The case was a criminal case—a prosecution for murder. It did not involve the interpretation of a visible wound and contusion clause of an insurance policy.

Furthermore, the victim suffered a wound in every sense of the word. The Court enumerates the manifestations of his injury as follows:

> His skull was fractured and slightly indented and there was a cut and bruise over the fracture. The cut and bruise and fracture were the only wounds on the body according to the testimony of the physicians. (p. 80)

American National v. Fox, 184 S. W. (2d) 937 Texas):

Here the Court decides that in case of accidental injury double indemnity must be paid if the manifes-

tation ordinarily attending that particular injury is present. In other words, even though there is no contusion or wound, the company must pay—simply because the particular accidental injury does not ordinarily produce a contusion or wound.

If the reasoning of the *Fox* case is carried to its logical conclusion, then in a case of accidental injury in which no physical manifestation ordinarily appears, the courts could dispense with the contusion or wound requirement altogether.

For example, a fatal overdose of sleeping tablets may produce death during sleep without any external symptom whatever except that ordinarily attendant on death itself. The victim just does not wake up. Suppose that a policyholder picks the wrong bottle out of his medicine chest, and thinking he is taking some harmless pills to relieve indigestion, swallows several sleeping tablets with fatal results. This is accidental death. But there is no contusion—there is no manifestation of any kind. Could any court justifiably decide that none is necessary to authorize recovery because sleeping tablets do not ordinarily produce any such manifestation on the exterior of the body? Certainly not. To do so would arbitrarily ignore the contusion requirement and radically enlarge the policy coverage.

The *Fox* case is a typical example of the attitude of some courts which seize on any conceivable ground to decide against insurance companies.

The double indemnity clause provides coverage in addition to the life insurance. The clause says in sub-

stance: Only death from a cause which produces a contusion or wound is covered. If a sunstroke (or heart attack) does not produce such a manifestation, then it is not a risk calling for double payment, even though death results from accidental means.

But the Texas court sweeps this aside and says to the insurance company: "If according to our view the particular death is accidental, we will require you to pay double indemnity and we care not what restrictive provisions to the contrary you have incorporated in your policy".

Cavallero v. Travelers, 267 N. W. 370 (Minn.): The clause in this case was in the form of an exception. There was a large variety of exceptions, and one of them was as follows:

> 22. This insurance shall not cover disappearance nor injuries of which there is no visible contusion or wound on the exterior of the body of the insured. (267 N. W. 371.)

On this ground the Minnesota Court held:

> Policy provisions limiting coverage, or excepting the insurer from liability under certain conditions, are to be strictly construed as to the insurer and liberally construed as to the insured. (p. 372)

Pursuant to this principle, the Court expressed the opinion that this clause could be interpreted "in harmony with the construction placed on provisions construing what constitutes visible signs or marks of injury on the exterior of the body" (p. 372).

We need not speculate as to whether the Court would have entertained the same view if it had been dealing with a clause providing coverage, instead of an exception. The contrary decisions in the *Stanfield* and *Ansley* cases—involving a clause identical with that at bar—should be followed here. The first Ansley appeal discusses the *Cavallero* case and points out its fallacies (see Appendix, supra).

Lewis v. Brotherhood, 79 N. E. 802 (Mass.):

This case is not concerned at all with the sufficiency of manifestations to satisfy the contusion or wound clause. The question there was whether the policy required a contusion or wound in case of drowning. There were two conflicting clauses on the subject. So the Court resolved the conflict in favor of the insured. And in doing so, the Court pointed out that there would be little logic in requiring a wound in a case of *drowning.*

Hill v. Great Northern Life, 57 Pac. (2d) 405 (Wash.):

There the clause was an exception excluding coverage unless there were contusions or wounds "or marks or evidence of injury" (p. 406). Hence, the policy was radically different from that at bar.

Masonic Assn. v. Campbell, 245 S. W. 307 (Ark.):

There was evidence "that there was an observable bruise and discolored condition of Formsby's toe . . . and that the place suppurated and broke" (page 308).

These symptoms clearly sufficed under a clause requiring "visible marks of contusions and wounds" (page 308).

PROVISIONS OF THE CALIFORNIA HEALTH CODE CITED IN THE FOREGOING BRIEF.

Section 10375:

The certificate of death shall contain the following items, and such other items as the department may designate:

. . . . . .

(22) Certification as to action of the coroner when compelled to act by law, stating kind of action taken, whether inquest, autopsy or inquiry, and the fact and cause of death.

Section 10400:

The medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased except in the following cases:

. . . . . .

(c) Where death is the result of an accident.

(d) Where an injury is a contributing cause of death.

Section 10425:

The certificate of death shall be made by the coroner in case of any death occurring under any of the following circumstances:

. . . . . .

(e) Where the deceased person died as the result of an accident.

Section 10551:

Any photostatic copy of the record of a birth, death, or marriage, or a copy, properly certified by the State or local registrar to have been registered within a period of one year from the date of the event is prima facie evidence in all courts and places of the facts stated in it.